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IN THE

Supreme Court of the United States

October Term, 1930.

No. 352

V. LOEWERS GAMBRINUS BREWERY COMPANY,
Petitioner,

vs.

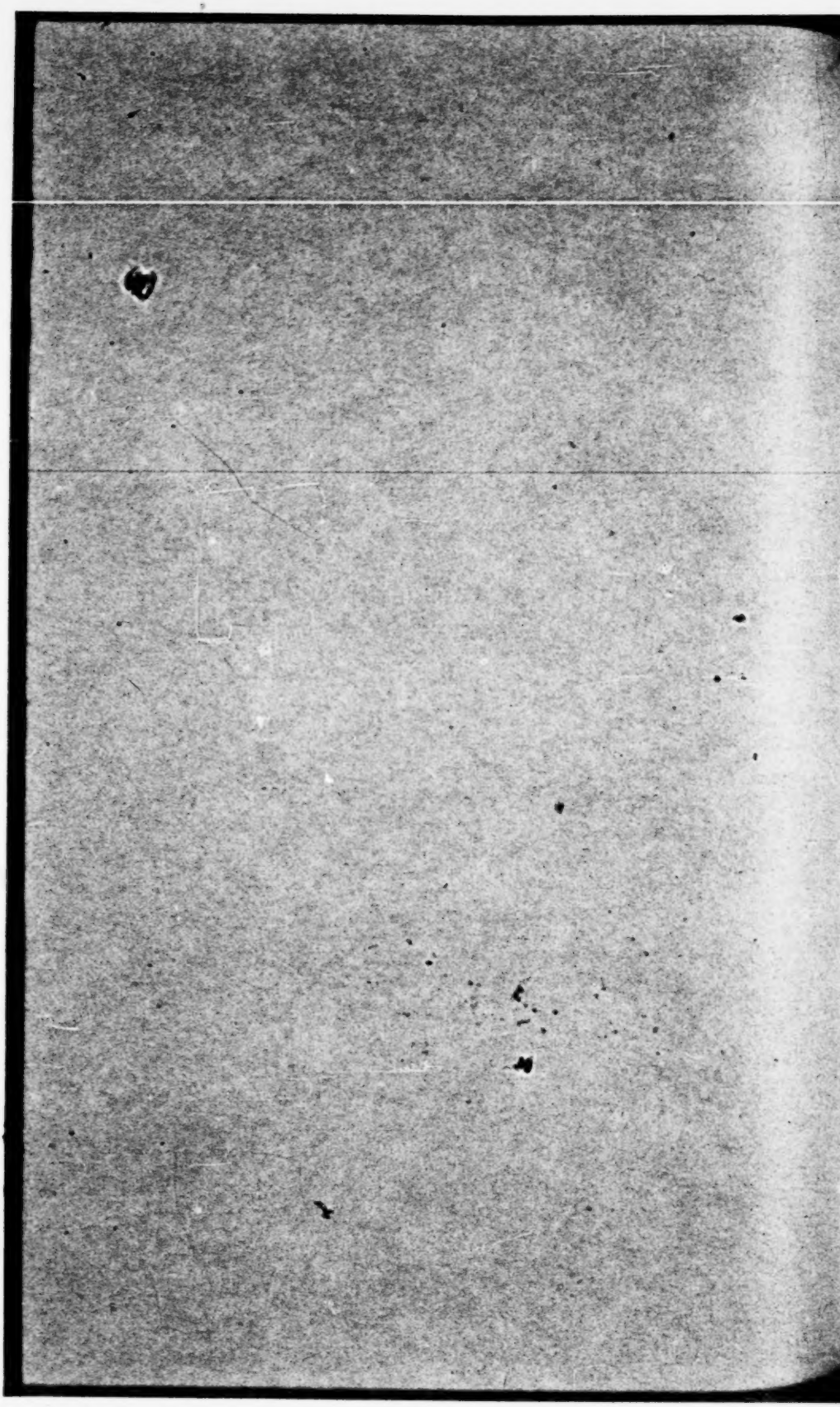
CHARLES W. ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

FRANK S. BRIGHT,
H. STANLEY HINRICHS,
Amici Curiae on Behalf of
GEORGE EHRET,
Southern Building,
Washington, D. C.

The Print Craft Shop, Washington, D. C.



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MOTION

FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned respectfully move the Court for leave to file the accompanying brief in this case as *amici curiae*.

This application is made as counsel for the estate of George Ehret, which now has pending before the United States Board of Tax Appeals, with the right of appeal from its decision to the Circuit Court of Appeals for the Second Circuit, a petition in which is presented *inter alia*, the question presented in this

case, namely, whether the late George Ehret was entitled to take any deduction for obsolescence of his tangible property used in the manufacture of beer during the taxable years 1918 and 1919, under Section 234(a) of the Revenue Act of 1918. The estate of the late George Ehret, therefore, has a vital interest in this case.

WHEREFORE, leave to file the accompanying brief is respectfully requested.

FRANK S. BRIGHT,
H. STANLEY HINRICHS,
Amici Curiae.

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BRIEF

BY FRANK S. BRIGHT AND H. STANLEY HINRICHS, AMICI CURIAE.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petition in this case seeks a review of a decision holding that a brewer, in computing his federal income tax liability under the Revenue Act of 1918, (C. 18, 40 Stat. at Large, 1057) is not entitled to a deduction under Section 234(a)(7) of the said Act on account of the obsolescence of tangible property used in his business.

In this case the Circuit Court of Appeals for the 2nd Circuit rested its decision entirely upon the decision of this Court in the case of *Clarke v. Haberle*

Crystal Springs Brewing Company, 280 U. S., 384, which it construed to mean that a brewer was not entitled to any allowance under said Revenue Act on account of the obsolescence of either tangible or intangible assets due to prohibition legislation.

The same question is also before this Court in *Lucas v. Niagara Falls Brewing Company*, No. 61, this term, on writ of certiorari to the same Court, which prior to the decision of this Court in the said case of *Clarke v. Haberle Crystal Springs Brewing Company* had allowed obsolescence on tangible assets of a brewery under similar circumstances.

ARGUMENT.

Point I. The Court Below Misconstrued the Decision of This Court in the Case of Clarke v. Haberle Crystal Springs Brewing Co.

In the case of *Clarke v. Haberle Crystal Springs Brewing Company, Supra*, this Court held that that particular taxpayer was not entitled to any of the deductions claimed on account of the obsolescence of its good will, stating that:

> "In our opinion the words now used cannot be extended to cover the loss in this case and it is needless to speculate as to what other cases it might include."

In that case, obsolescence of good will only was involved. In this case, the Court below has interpreted the decision of this Court in the said case to mean that no brewer is entitled to any deductions for obsolescence of tangible or intangible property.

Thus, it is stated in the opinion below (Record 212) that

> "In view of the decision of the Supreme Court in *Clarke vs. Haberle Crystal Springs Brewing Co.* ((1929) 280 U. S. 384; 74 L. Ed. 227) a deduction in the value of the building for obsolescence may not be made. We can see no difference between tangible and intangible property within the principle of that case."

The Commissioner of Internal Revenue has also construed the decision of this Court in the case of *Clarke v. Haberle Crystal Springs Brewing Company, supra,* to mean that brewers in computing their Federal Income Tax liability for the years 1918 and 1919, are not entitled to a deduction on account of the obsolescence of tangible property used in the business.

It is respectfully submitted that such a construction of the decision of this Court in the Haberle case is erroneous, because that would inevitably mean that the Federal Income tax liability of brewers under the Revenue Act of 1918 must be based upon their *gross receipts* and not upon their *net income,* for if they are entitled to any deduction whatever from their gross receipts there is as much reason for allowing them the statutory deduction for obsolescence of tangible property used in the business as there is for allowing them the cost of labor, the cost of material, depreciation of equipment, bad debts, etc. And it would necessarily follow that no corporation or individual citizen of the United States would be en-

titled to any of the deductions provided by the statute, because in the statute Congress has not differentiated brewers from any other class of citizens, and this Court, in the case of *Crooks v. Harrelson*, No. 24, this term, has held that the exact wording of a taxing statute must be followed if it is unambiguous. Under that decision (not yet reported) it would seem to be clear that brewers are entitled to every deduction granted by the statute to all taxpayers.

Point II. The Revenue Act of 1918 Contemplates a Deduction on Account of Exhaustion or Obsolescence of Intangible as Well as Tangible Property of All Taxpayers, Including Brewers.

May we, with all due respect, suggest to the Court that if in its decision in the case of *Clarke v. Haberle Crystal Springs Brewing Company, supra*, it was intended to hold that Section 234(a)(7) of the Revenue Act of 1918 provides for an allowance for the exhaustion and obsolescence of only *tangible* property and not for any allowance to cover *intangible* property, the decision is still too broad, because said paragraph provides for

> "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence"

and *property* used in the business may be intangible as well as tangible. This fact is recognized in the same statute, in its definition of invested capital in Section 325(a) where it is stated

"That as used in this title—

"The term 'intangible property' means patents, copyrights, secret processes, and formulae, good will, trade marks, trade brands, franchises, and other like property.

"The term 'tangible property' means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property than intangible property."

Section 234 of the Revenue Act of 1918 does not differentiate between "tangible" and "intangible" property and such division is not one which is generally recognized in the law. However, when the terms "tangible" and "intangible" property are used in the statute they are defined. It would therefore seem to be clear that the terms "tangible property" and "intangible property" are, for the purposes of this Revenue Act, statutory terms and each of them is included in the word "property".

It is indisputable that any of the above items classed as "intangible property" may be property of great value in the business of any particular taxpayer, and there is nothing in the statute to differentiate "good will" from "franchises and other like property". Therefore if this court intended in the decision in the case of *Clarke v. Haberle Springs Brewing Company* to deprive a taxpayer of a deduction on account of the obsolescence of good will or other forms of intangible property in a proper case it would seem that the court has gone beyond a fair construction of the statute.

In the said decision this court stated that

> "When a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government or a partial compensation in the form of an abatement of taxes otherwise due."

Is it not true none of the provisions of Section 234 of the Revenue Act of 1918 provide for any "compensation" or "abatement of taxes otherwise due", but all of the provisions in Section 234 constitute a part of the directions of the Congress in determining what taxes are due? Surely there is nothing in Section 234 which differentiates any particular provision in said section as "compensation", and with great respect it is submitted that the deduction on account of obsolescence is no more a "contribution" or an "abatement of taxes otherwise due" than the deduction in paragraph (1) of said Section 234, of "all the ordinary and necessary expenses paid * * * in carrying on any trade or business." The point is that the term "net income" is a misnomer unless all the deductions provided for in Section 234 are allowed.

May we also very respectfully suggest that there is nothing in the statute which would authorize a court to deprive a taxpayer of any one of said deductions because the business is noxious or objectionable or even if the business is illegal, and that any such interpretation would render the statute void for ambiguity. If a court had such power, might it not be held that those who were engaged in an illegal

business should be deprived of all of the deductions allowed by the statute? Those engaged in a noxious business should be deprived of some of the deductions granted by the statute to other taxpayers, while those engaged in a business which was merely objectionable should be deprived of only one deduction, dependent upon how objectionable the business might be, while those engaged in a business of unquestionable respectability, and entirely unobjectionable, would be the only ones entitled to all the statutory deductions authorized by Congress in computing the net income of all corporations.

In the case of brewers in particular it would seem that inasmuch as the business was extinguished by an act of Congress for which Congress made no kind of compensation (as Great Britain constantly does in the reduction of the brewery and saloon business) that courts of the United States in the interpretation of the Revenue Acts should not read into that statute an interpretation which would further deprive brewers of the rights to which all other classes of citizens are entitled unless Congress in the taxing statute has clearly expressed a determination to discriminate against them; and if Congress had attempted to do so, would not the statute have been unconstitutional on the ground of its lack of uniformity?

Respectfully submitted.

FRANK S. BRIGHT,

H. STANLEY HINRICHS,

Amici Curiae.